IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 22891 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?Yes

2 To be referred to the Reporter or not ?Yes

3 Whether their Lordships wish to see the fair copy of the judgment ?No

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?No

5 Whether it is to be circulated to the civil judge ?No

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THE NEW INDIA ASSURANCE COMPANY LTD., - Petitioner(s)
Versus
THE STATE TRADING CORPORATION OF INDIA LTD., & 1 - Respondent(s)

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Appearance :

MR PV NANAVATI for Petitioner(s) : 1,MR VIBHUTI NANAVATI for Petitioner(s) : 1,
MR MIHIR THAKORE WITH MR AMAR N BHATT for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date :01/12/2006

CAV JUDGMENT

1. New India Assurance Company Limited, the petitioner, original defendant has filed petition under Article 227 of the Constitution of India praying for issuance of writ of certiorari for challenging the judgment and order dated 22nd September 2006 passed by the Chamber Judge, City Civil Court, Ahmedabad in Summary Suit No.2812 of 2004 below Summons for Judgment Exhibit 12. The learned trial Judge by his impugned order held that leave to defend be granted to the defendants in summary suits No.2812 of 2004 and 2813 of 2004 on condition to deposit 50% of the said amount in both the suits within four weeks from today. On depositing the amount thus suits to be transferred to allow the long cause suit.

BASIC FACTS OF CIVIL SUIT NO.2812 OF 2004:

1.1 The State Trading Corporation of India Ltd. (Government of India undertaking, plaintiff

No.1 and Adani Exports Ltd., plaintiff No.2 (hereinafter referred to as the plaintiffs) had filed a suit under Order 37 of Code of Civil Procedure (for short C.P.C.) for the liquidated demand of total amount of Rs.4,48,32,365/- interest on the same from date of the suit over the same. All these amounts have been claimed for loss of goods at Porbandar, Kandla and Mundra Ports being principal amount Rs.3,59,07,604.00 and interest on the said amounts from 5.6.2003 to 20.10.2004 – from the date of notice till filing of the suit and further interest on the said amount till realisation in favour of the plaintiff i.e. Rs.3,59,07,604.00 (principal amount) + Rs.89,24,761.00 (interest amount) = Rs.4,48,32,365/-.

1.2 Plaintiff No.1 is a Government Undertaking Company registered under the provisions of Companies Act, 1956. Plaintiff No.1 is carrying on business inter alia trading business and more particularly business of exporting and importing

of various commodities including food grains. The majority of the shares of plaintiff No.1 Company are owned by Government of India.

1.2A Plaintiff No.2 is a Company registered under the Companies Act, 1956 and is carrying on business of export and import in India.

1.3 It is case of the plaintiffs that plaintiff No.1 entered into a contract on 05.02.2001 with plaintiff No.2 under which plaintiff No.2 was responsible for execution of the contract entered into between plaintiff No.1 and M/s. Al Hadha Trading Co. (L.L.C.) of Dubai for export of 90,000 MTs. of Indian wheat in bulk under which plaintiff No.1 had agreed to supply wheat to the said foreign buyer. As an associate supplier, plaintiff No.2 was required to arrange for the movement of the cargo from upcountry centers to various ports from which the said goods were to be shipped to the foreign buyer at destination.

1.4 Plaintiff No.1 by its letter dated 28.5.2001 appointed plaintiff No.2 as its authorized agent and to do all necessary acts and deed for the recovery of the amount of their claim arising out of marine insurance policy issued by the New India Assurance Company Ltd. (petitioner herein and original defendant in Summary Suit). Plaintiff No.2 was authorized to make claim, negotiate, compromise, settle and receive the payment in respect thereof from the defendant. Plaintiff No.1 also gave sufficient instructions to the defendant to deal with plaintiff No.2 as agent of plaintiff No.1 in respect of all the matters relating to the marine insurance policy issued by the defendant in this behalf.

1.5 Defendant is an insurance company having its Registered Office and Head Office at Mumbai and a Regional Office and Divisional Office at Ahmedabad. Defendant has issued in favour of the plaintiff No.1, the Marine Insurance Policy

initially for Rs.25,65,00,000/- for 50,000 MTs of wheat at the rate of Rs.5130/- per MT, which was subsequently increased to an insured value of Rs.38.475 crores being the value for 75,000 MTs at the rate of Rs.5130/- per MT by further endorsement. A total premium of Rs.4,78,389/- was paid for said sum insured, which was the agreed value of the subject matter. The period of the said policy was from 16.4.2001 to 15.4.2002. The said Open Marine Policy was issued to protect the assured against losses on the land incidental to the intended sea voyage. The said open Marine Policy was for the consignment of wheat in jute bags and/or bulk to be dispatched from the godowns of Food Corporation of India Ltd. anywhere in India by Rail or Road to any port in Gujarat.

1.6 A cyclone formed near Goa in Arabian Sea during mid May, 2001 travelled towards coastal area of Gujarat including Porbandar, Kandla and Mundra. All the coastal areas of Saurashtra and more particularly the three ports referred to

above experienced cyclonic winds accompanied by rain in the last week of the month of May and 1st half of June, 2001. Due to cyclonic winds and rain, wheat stored on the aforesaid ports either in godown or in open plots or in jetty areas was severely damaged by heavy rains, risk of which was covered under the aforesaid policy. Thereafter the correspondence was made between the parties.

1.7 Immediately plaintiff No.2 informed the Insurance Company about the damage caused by the cyclone and requested the defendant to depute its surveyors for assessing the loss. The defendant appointed M/s. Indian Surveyors Private Ltd. Rajkot, on 3.6.2001 to survey and assess the loss and the representative of the said surveyor visited Porbandar on 4.6.2001. Defendant also appointed another surveyor M/s. Mehta and Padamsey Pvt. Ltd. Ahmedabad as joint surveyor for the very work on 14.8.2001 and both the aforesaid surveyors appointed by defendant visited Porbandar several times i.e. 14.8.2001,

20.8.2001 and 21.8.2002 and conducted the detailed survey on 7.12.2001. Thus, both the said joint surveyors jointly and severally visited Porbandar site several times. Based on the said report, plaintiffs submitted a detailed claim statement dated 3.1.2002 and accordingly plaintiffs claim in respect of the policy was Rs.1,29,18,586/- in respect of the loss suffered at Porbandar port, similarly for Kandla Port Rs.1,29,05319/- and for Mundra Port Rs.92,65,085/- in all Rs.1,29,18,586/- + Rs.1,29,05,319/- + Rs.92,65,085/-= Rs.3,50,88,990/-. (Rupees Three Crores Fifty Lacs Eighty Eight Thousand Nine Hundred Ninety only).

1.8 The plaintiffs have also stated that in view of the decision of **ONGC Vs. Collector of Central Excise reported in (1995) Supreme Court (4) SCC 541**, in which it is held that in every case where a dispute is between Government Departments and/or between a Government Department and Public Sector Undertaking, the matter should be referred to the High Power

committee established by the Government pursuant to the order of the Hon'ble Supreme Court. As the dispute between State Trading Corporation which is Government undertaking and the New India Assurance Co. Ltd., which is also Government of India undertaking. The meeting of the committee held on 2.9.2004, the committee have finally decided to refer this matter for adjudication to the jurisdictional Court of law.

PRESENT CONTROVERSY :

2. The plaintiffs therefore filed suit for liquidated demand of money on account of percentage loss arrived by arithmetic calculation and suit is filed under Order 37 of the CPC. The suit was filed accordingly somewhere in October 2004. Along with the suit, the plaintiffs have filed voluminous record-documents with list Exhibit 2 i.e. 2/1 to 2/48 (with other relevant papers – paper book running into about 400 pages) which are produced by the plaintiffs by way of separate paper book. After

filing of the suit, the notice has been issued to the defendant and they have been served and filed appearance before this Court.

2.1 Thereafter, the plaintiffs took out Summons For Judgment somewhere on 10.1.2005 and filed affidavit in support of the same. In support of the same, whatever contentions raised in the plaint, have been set out therein, therefore, I do not repeat the said averments again in this behalf.

DEFENDANTS' REPLY :

2.2 Against the said Summons For Judgment, the defendants had filed reply to summons for Judgment taken out by the plaintiffs. The facts stated in the plaint have been stated in support of suit and in support of the same, so this substantially admitted by the defendant. However, it has been stated that the defendant appointed M/s. J. Basheer & Associates Surveyors Pvt. Ltd. for investigation in the matter and the said agency has carried out survey in this behalf. The

defendant has relied upon the report of the said surveyor, and on the said basis, the defendant repudiating the claim on the grounds that there has been inordinate delay in intimating the losses which has led to breach of the policy. It was also stated that the insured had neither taken any precautions to protect the cargo which was lying in the Port nor has acted as if prudent uninsured by undertaking loss minimization measures for preventing further aggravation of losses. It has further stated that such contract of insurance has become null and void and all the benefits under the policy are forfeited.

PLAINTIFFS REJOINDER :

2.3 The plaintiffs have filed rejoinder of ons Shri Brigadier S.S. Bhatti of the plaintiff No.2, which is on page 371 of the paper book. It was contended that the defendant is not entitled to rely upon report of M/s. J. Basheer & Associates Surveyors Pvt. Ltd. It was further stated that the defendant has also suppressed

from the Court and the plaintiffs, the alleged letters of appointment of Basheer as the investigator and/or surveyor. The defendant neither disclosed as to who appointed him i.e. which particular officer of the defendant appointed him nor what were his terms of reference and within how much time they were asked to submit the report. The defendant informed the plaintiffs by its letter dated 8.11.2001 that Basheer and Associates Surveyors Pvt. Ltd. was appointed for finalisation of the claim. The plaintiffs were never informed that Basheer and Associates Surveyors Pvt. Ltd. was appointed either as an independent investigator or an appellate assessor. The plaintiffs further submitted, that in this case, Indian Surveyors Private Ltd. were appointed on 3.6.2001 as surveyors to carry out the survey at Porbandar and their Mr. Lalit Oza, representative visited several times thereafter. It is submitted that M/s. Mehta and Padamsey Pvt. Ltd., Ahmedabad were also appointed on 14.8.2001 as joint surveyor for the purpose and its representative Mr. Rajiv Shah

visited the site several times. Thereafter both the said surveyors submitted their joint report on 7.12.2001 about the loss damage to the goods suffered at Porbandar. It was stated that on this report plaintiffs filed their detailed claim on 3.1.2002.

2.3A M/s. J.B. Boda surveyors Private Limited were appointed on 8.6.2001 to carry out the survey for the loss/damage suffer at Kandla and submitted their detailed report on 14.9.2001 based on which the plaintiffs filed their detailed claim on 25.2.2002.

2.3B M/s. G.P. Dave and Sons were appointed as Surveyors on 15.6.2001 to carry out the survey of loss/damage suffer at Mundra Port, and their representative visited the site several times and submitted their report on 7.1.2002 and revised report on 17.10.2002 and the plaintiffs filed their detailed claim on 22.2.2002 and revised claim on 21.8.2002.

2.4 The plaintiffs further submitted that the second surveyor had no occasion to see, inspect or assess the damaged cargo or the operation carried out at respective place/ports for salvaging the goods or for segregating the damaged goods from undamaged goods, as the goods were already removed from the side by that time (i.e. by the time second surveyor visited the site). In fact Basheer has not at all carried out any survey. Even only when the suit is filed, in reply, the defendant has come with a case that the defendant has already appointed another surveyor and that surveyor has assessed damage at the different amount and therefore, the defendant has no liability to pay damages as per the report of the earlier surveyor. The Basheer and Company took 19 months to give their report.

2.5 It was further submitted that the defendant has neither rejected their reports nor disagreed with the said reports. The defendant neither disapproved the same nor given any reasons for appointing Basheer and Associates

Surveyors Pvt. Ltd. It appears that even a copy of the report of M/s. Basheer and Associates Surveyors Pvt. Ltd. was never supplied to the plaintiffs in spite of several requests in writing made by letters dated 23.7.2003, 29.7.2003 and 6.8.2003. Basheer's reports disclosed that they have considered themselves as an appellate authority to give reasons or grounds with a view to prepare a defence in the suit that the plaintiffs may file. Defendant has also suppressed the correspondence made between defendant and Basheer at various stages.

2.6 During correspondence, it is stated that plaintiffs by letter dated 8.3.2002 without prejudice and informing them that the underwriters (defendant) had already appointed approved surveyors and loss assessors as per the provisions of IRDA Act, 1999 as indicated in the said letter and that they had already submitted their reports based on which claim statements were filed by the plaintiffs and therefore, plaintiffs looked forward to an early settlement

of their claims. Thus, whatsoever defence raised by the defendant was replied by plaintiffs in their rejoinder in this behalf. The said rejoinder was filed somewhere in October 2005 and the plaintiffs have relied upon the statement showing percentage of damage compared with total cargo in this behalf.

TRIAL COURT FINDINGS :

2.6A The trial Court has come to the conclusion that the defendant had issued marine insurance policy for the period from 16.4.2001 to 15.4.2002 for the goods to be carried out from various ports of the country to ports Okha, Kandla, Porbandar, Mundra and Bhavnagar and loaded in the ship for the purpose of export. It was open marine policy. There was cyclone at the end of May 2001 and first week of June. The goods were seriously damaged. Four Government approved surveyors were appointed to assess damages. They have visited sites on ports. They have inspected the goods. Segregation work was carried out in their presence. Insurance Companies were also

informed. Their officers have also inspected the site and verified the damaged goods. Four Government approved surveyors have assessed the damages as stated in the report. The plaintiffs raised claim on the basis of damages assessed by the Government approved surveyors. The defendant did not reply for long time. The defendant never raised objection against their report. Thereafter the defendant appointed two surveyors J.Bashir & Company and Trans Ocean Marine & General Survey Agency in the month of November 2001. There was no chance for them to visit or to verify physical condition of the goods as goods were already removed. They have assessed the damages by perusing the papers and earlier reports submitted by four Government approved surveyors. The two surveyors have also admitted the loss in this behalf. There was no justification for the defendants to discard earlier surveyor's report and to appoint another surveyor. The defendant has not produced any material or reason for discarding the earlier surveyor's report and appointing fresh surveyors.

2.6B The trial court came to the conclusion that whatever stated by the subsequent two surveyors in their report cannot be treated as final or conclusive. There are earlier surveyor's reports prepared by the Government approved surveyors having the same authority. In view of the same, the learned trial Judge has passed the order and held that leave to defend granted to the defendants in Summary Suits No.2812/04 and 2813/04 on condition to deposit 50% of the suit amount in both the suits within four weeks from today.

3. Being aggrieved and dissatisfied with the said order, the New India Assurance Co. Ltd. has filed Special Civil Applications before this Court on 2.11.2006.

3.1 The matters were heard at length. On behalf of the petitioner, Mr. V.P. Nanavati, learned advocate for Mr. P.V. Nanavati, learned

advocate appearing on behalf of original defendant – petitioner herein. Mr. Mihir Thakore learned Senior Counsel with Mr. Amar Bhatt, learned advocate appeared for original plaintiffs in one matter and in second matter Mr. Kamal Trivedi, learned Senior counsel and Advocate General with Mr. Thakar, on behalf of Trivedi & Gupta appeared for respondent No.1 & 2.

3.2 In this case RULE is issued and Mr.Amar Bhatt, learned advocate waives service of rule on behalf of original plaintiffs in Special Civil Application No.22891 of 2006 and in another case i.e. in Special Civil Application No.22892 of 2006 Mr.K.J.Thakar, learned advocate of Trivedi & Gupta, waives service of rule on behalf of original plaintiffs. With consent of learned advocates for the parties, the matters have been taken for final disposal.

PETITIONERS' CONTENTIONS :

4. Mr. Vibhuti Nanavati, learned advocate on

behalf Mr. P.V. Nanavati for the petitioners made following submissions.

4.1 The Insurance Company has submitted that the plaintiffs have not been able to prove that the demand, as alleged, has been caused to their insured goods. The damages were aggravated as the plaintiffs have not taken immediate action to minimise the loss. The entire consignment remained at the port upto September 2001 and on account of the said delay damages were aggravated. It was further submitted that if the damaged goods were sold by public auction they would have realized more amounts so damage could have been minimise. The plaintiff No.2 has sold goods at lower price that has aggravated the damages. The plaintiffs have not deducted the amount of sale of damaged cargo from its claim. The defendant Insurance Company has challenged the maintainability of the Suit under Order 37 of the Code of Civil Procedure and it has repudiated the claim under Marine Insurance Policy. Basically the insurance policy provides indemnity

to the insured. The defendant has relied on the following definition of 'indemnity' as defined in Black's Law Dictionary, 6th edition.

> "Indemnity – Reimbursement. An undertaking whereby one agrees to indemnity another upon the occurrence of an anticipated loss. Dawson V. Fidelity & Deposit Co. of Md. D.C.S.D., 189 F. Supp. 854, 865. A contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or possively at fault to another who is primarily or actively responsible. Moorhead Vs. Waelde, La. App., 499 So. 2D 387, 389. Compare Contribution; Subrogation. The benefit payable under an insurance policy. Immunity from the punishment of past offence. Lawson Vs. Halifax-Tonopah Min. Co., 36 Nev. 591, 135 P. 611, 613. The term is also used to denote the compensation given to make a person whole from a loss already

sustained; as where the government gives indemnity for private property taken by it for public use. See Condemnation; Eminent 1domain; Expropriation; Just Compensation".

4.2 Learned Counsel for the petitioners has submitted that in this case, the petitioners have claimed total Rs.4,48,32,365/- with further interest @ 18% p.a. from the date of the suit till realisation in favour of the plaintiffs. The learned counsel submitted that in view of the judgment of this Court in **1982 Guj. (UJ) 7** in the case of **Kalubhai Karsanbhai Vs. Bai Jiviben Ramji** wherein it has been held that when there is a demand of interest in the plaint, the Court ought to have granted unconditional leave.

4.2A The learned advocate has also relied upon **1990 (2) GLH 438** in the case of **Jashbhai Motibhai Patel Vs. Hasmukhbhai Ravjibhai Patel** in which it has been held that the defendant by denying the very existence and execution of the suit

promissory note, in that cases, unconditional leave to defend has to be granted.

4.3 The lower Court has further stated that the plaintiffs have claimed damages and the same can be exercised only by adducing evidence and in turn can be claimed that too on the date of the decree as per the provisions of Section 73 of the Indian Contract Act. Thereafter, the plaintiffs would be entitled for interest, that too from the date of the decree and not from the date of suit.

4.4 The lower Court has held that in Summary Suit arising under the insurance contract and specifically when the insurance company has repudiated the claim by providing cogent reasons for repudiation. The defendants have contended that when relying upon the survey report, the defendant have disputed the survey report than it cannot be called upon again to raise triable issues or defence in its leave to defend affidavit. Thus, the reasoning of the trial

Court is arbitrary and erroneous considering the provisions of law of indemnity and insurance law. The petitioner has completely denied its liability under the policy.

4.5 As regards survey report, it is the case of the defendant that the plaintiffs have contested the appointment of second surveyors for finalisation of the remaining survey work as the earlier surveyors visited the place, noted the damage in their report and further noted the salvage work carried out by the plaintiffs. The said surveyors finalised the report relying upon the earlier survey reports and the information provided and documents supplied by the plaintiffs. In that view of the matter, the plaintiffs have acquiesced/waived their right of protest regarding appointment of final surveyor. The contention of the plaintiffs that they have raised question of appointment of second surveyor is side-track the real issue.

4.6 The learned counsel further submitted

that the defendant has rely upon the defence which has been filed before the trail court the defendant has clearly demonstrated that the present suit raises 'triable issue'.

4.7 The learned counsel for the defendant further submitted that the learned trial Court has committed a serious jurisdiction error by not arriving at a finding that the defendant has failed to indicate substantial triable defence. The learned advocate submitted that so the present Special Civil Application is maintainable at law. The defendant may be permitted to defend the suit unconditionally as it has got fair chance of success which can prove by evidence.

4.8 The learned counsel has further submitted that the learned trial Judge has not properly exercised jurisdiction while imposing condition regarding deposit of 50% of the suit amount. In this behalf, he has stated that the learned trial Judge has not followed settled principle of law particularly in decision **Santosh**

Kumar Vs. Bhai Mool Singh, AIR 1958 Supreme Court 321 in the case of **M/s. Mechalec Engineers & Manufacturers Vs. M/s. Basic Equipment Corporation, AIR 1977 Supreme Court 577.**

5. Contention of Mr.Mihir Thakore, learned Senior Counsel with Mr.Amar Bhatt and contention of Mr.Kamal Trivedi, learned Advocate General and Senior Advocate with Mr.K.J.Thakar of Trivedi & Gupta on behalf of original plaintiffs.

5.1 The learned Senior Counsels for the respondent submitted that in the present case, the claim made by the plaintiffs that the suit is based on Marine Policy at Exhibit 4/13.4 on page 43 to 51 of the paper book. He has mainly relied upon the following condition of the policy.

> "ANY PORAT IN GUJARAT & BULKED AT PORT GODOWN AND/OR OPEN PLOT AND/OR JETTY AREA & THEN TRANSPORTED IN BULK AND LOADED IN TO SHIP".

5.1A In view of this, the learned counsel

submitted that if the plaintiffs have stored goods in open space, the same was in conformity of the Insurance policy and not violating any condition of policy in view of the above clause.

5.2 The commencement of marine policy is from 16.4.2001 to 15.4.2002, wherein the incident took place on 20.5.2000, so the period in question covers the policy in this behalf.

5.3 It may be further noted that in this case, the goods have been damaged because of cyclone i.e. the act of VIS MAJOR i.e. the act of God somewhere in May/June, 2001. After the said VIS MAJOR, the Insurance Company - Defendant has appointed various surveyors for different ports and all surveyors have visited, inspected and arrived at a finding that the plaintiffs have suffered loss due to cyclone. In view of the same, the claim of the plaintiffs is based on liquidated demand as per the report of the surveyors.

5.4 Learned advocate further submitted that the claim made by the petitioner is based on survey report of M/s. Mehta & Padamsey Pvt. Ltd. dated 7.12.2001, (pages 23 to 31). Second report is of M/s. J.B. Boda Surveyors Private Ltd. dated 14.9.2001 (from pages No.126 to 135). Third report of G.P. Dave & Sons dated 3.1.2002 (pages 226 to 235).

5.5 He has submitted that in view of the provisions of Order 37 Rule 2(b) which provides the suit in which the plaintiffs seek only to recover a debt or liquidated demand in money payable by the defendant with or without interest, the suit under Order 37 is maintainable.

5.5A In support of the same, the learned counsels have relied upon the judgment **AIR 1990 DELHI 278 in the case of Rajinder Kumar Khanna Vs. Oriental Insurance Co.** (particularly para 3 & 12 on page No.279, 280).

5.6 The learned counsel for the plaintiffs submitted that plaintiffs' suit is filed not for damages as contemplated under Section 73 of the Contract Act. They have only claimed damages on the basis of the reports of surveyors. So suit is filed for the liquidated demand as indicated earlier.

5.7 Regarding report of second surveyor, it may be noted that the entire basis of the defendant's contention is that they have appointed second surveyor and the said surveyor has assessed damages of the goods differently and therefore, the claim of the plaintiffs are not maintainable. The learned advocate for the original plaintiffs respondents herein has submitted as under :

5.8 The defendant addressed a letter dated 8.11.2001 informing the plaintiffs that M/s. J. Basheer and Associates Surveyors Pvt. Ltd. and Transocean Marine & Survey Agencies have been appointed for M/s. STC and PEC Ltd.'s claims

respectively for finalisation of the claims.

5.9 The learned counsel submitted that the defendant could not have appointed second surveyor, once first surveyor has already been appointed by the defendant. In support of the same, the learned counsel has relied upon the decision of the the judgment of National Consumer Disputes Redressal Commission, New Delhi (Hon'ble Mr.Justice D.P. Wadhwa, President and other members) in the case of **National Insurance Company Ltd. Vs. New Patiala Trading Company** in which interpreting of Section 64UM of the Insurance Act 1938 that insurer can not appoint second surveyor just as a matter of course. If the report of the surveyor or loss assessor is not acceptable to the insurer it must specify reasons but it is not free to appoint second surveyor. In this regard, the learned counsel has also relied upon another Judgment National Consumer Disputes Redressal Commission, New Delhi in the case of **M/s. Hundi Lal Jain Cold Storage and Ice Factory Pvt. Ltd. Vs. Oriental Insurance**

Co. Ltd. (Hon'ble Mr.Justice M.B. Shah, President and other members) decided on 24.5.2004.

5.10 The learned counsel has further submitted that even if the defendant can appoint second surveyor, the report of the second surveyor cannot be relied for the following reasons :

5.10A The second surveyors had no occasion to see, inspect or assess the damaged cargo or the operation carried out at respective place for salvaging the goods. The second surveyors has no occasion to segregate the damaged goods from undamaged goods, as the goods were already removed from the side by this time.

5.10B In any view of the matter, the defendant has not supplied copy of so-called second surveyors. So the same is in violation of principles of natural justice.

5.10C When the plaintiffs have filed the suit, in reply, the defendant raised contention of

appointment of second surveyor. The defendants have relied upon their report and then basis on which denied plaintiffs' claim. The second surveyor was only appointed for finalization of the claim, he could not act as an appellate authority in this behalf.

5.10D The learned counsel for the plaintiffs stated that the insurance company has also stated that the insurance company has addressed a letter that second surveyor appointed for finalisation of the claim and therefore the plaintiffs have co-operated in the action of second surveyor. However, thereafter the second surveyor has worked as an appellate officer of the first surveyor that was not envisaged by the original plaintiffs. So it was submitted that there was no question of plaintiffs acquiesced in the report of the second surveyor.

5.10E The learned counsel submitted that the plaintiffs have taken maximum care in connection with the storage as well as selling of the goods

and from the record it appears that only 9% of the loss of the goods, this shows that the plaintiffs have taken enough care and attention in preserving and protecting of the goods.

5.11 The learned advocate further submitted that the amendment in Order 37 of C.P.C., particularly Clause (b), which provides that the suit in which the plaintiffs seek only to recovery on liquidated demand in money payable by the defendant with or without interest arising on a written contract. He has submitted that in view of Order 37, the plaintiffs suit for claiming principal amount plus interest on it is maintainable at law. He has further submitted that aforesaid position has been reinstated by the judgment in the case of Ficom **Organics Ltd. V. Laffans Petrochemicals (Guj.) 99 Company Cases (2000) 471**, more particularly page 487.

5.12 The learned advocate further submitted that though Section 115 of the CPC is not

available but even if Section 115 is available then also once the trial court has exercised discretion which is vested in it by law and when the learned Judge has passed the order on sound judicial principle giving cogent and convincing reasons, this Court may not interfere with the said finding of the learned trial Judge. In support of the same the learned advocate has relied upon the Division Bench judgment of this Court in the case of **United Industries and others Vs. M/s.Dalwadi and Company and another reported in AIR 1969 Guj.18**. In any view of the matter, he has further submitted that now Sec.115 of the CPC has been deleted and the petitioner filed present petition under Article 227 of the Constitution of India and, therefore, this Court may not exercise jurisdiction vested in Article 227 of the Constitution of India when the learned Judge has not committed jurisdictional error or there is no error apparent on the record. In support of the same he has relied upon the judgment of the Hon'ble Apex Court in the case of **Mohd. Yunus Vs. Mohd. Mustquin reported in 1984**

SC 38 and another judgment of Hon'ble Apex Court in the case of Ouseph Mathai and others Vs. M.Abdul Khadir reported in (2002) 1 SCC 319.

REJOINDER OF MR.VIBHUTI NANAVATI:

6. The respondents have challenged maintainability of Special Civil Application as per the provisions under Article 227 of the Constitution of India. He has submitted that originally power was exercised under Section 115 of Code of Civil Procedure, but the Code of the Civil Procedure amended on 1.7.2002. Therefore, this application under Article 227 of the Constitution of India is maintainable. He has relied upon the judgment of the Apex Court in **AIR 2003 SC 3044** in the case of **Surya Dev Rai Vs. Ram Chander Rai**.

6.1 The learned advocate for the original defendant submitted that the learned advocate for the plaintiffs cannot rely upon the Division Bench judgment of this Court in the case of

United Industries and others Vs. **M/s.Dalwadi and Co. and another reported in AIR 1969 Guj. 18** because the said decision has been further explained by the Division Bench of this Court in the case of **New Ashapuri Society Ltd. Vs. Arvindkumar** reported in **16 GLR 53**.

7. Mr.Mihir Thakore, learned Counsel submitted that the learned advocate for the petitioner-original defendant cannot rely upon the Division Bench judgment of this Court in the case of New Ashapuri Society Ltd. (supra) because ultimately the said judgment viz. New Ashapuri case (supra) also supports the case of the original plaintiffs particularly last para which is in favour of the plaintiffs.

COURT'S OBSERVATION AND FINDINGS :

8. I have considered the facts and circumstances of the case, though number of contentions and number of authorities are cited, however, the suit itself is pending. This Court will only deal with the issues which are raised

by the parties with the present petition.

WHETER SUIT IS MAINTAINABLE UNDER ORDER 37 of C.P.C. :

8.1 In this case, the plaintiffs had filed suit on the basis that they have suffered damages to the goods on account VIS MAJOR. The defendant has appointed surveyors and the surveyors have submitted their reports. The said reports were not repudiated by the defendant. Therefore, the claim of the plaintiffs are based on liquidated demand.

8.2 Regarding maintainability of the suit, this Court rely upon Order 37 Rule 2 of the C.P.C. Which reads as follows:

> “(2) subject to the provisions of sub-rule (1), the Order applies to the following classes of suits, namely -
>
> (a) Suits upon bills of exchange, hundies and promissory notes;
>
> (b) Suits in which the plaintiff seeks only to recover a debt or liquidated

demand in money payable by the defendant, with or without interest, arising -

(i) on a written contract; or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only;"

8.3 Therefore once the suit has been filed for liquidated demand in view of Order 37 Rule 2(b) of the CPC, the suit is maintainable at law. In this behalf I also rely on the judgment of Delhi High Court in the case of **Rajinder Kumar Khanna Vs. The Oriental Insurance Co. and another reported in AIR 1990 Delhi 278** particularly para 3 and 12 of the said judgment on page 279 and 280 which reads as under:

8.3A "(para 3). The industry of counsel had not been able to produce a single

precedent of courts in India, which explained what is “liquidated demand”. However, reference has been made to Words & Phrases Permanent Edition, in which reference is made to Rifkin v. Safenovitz, 40 A 2d. 188. It is stated that “amount claimed to be due is a “liquidated demand” within statute authorizing summary judgments if it is susceptible of being made certain in amount by mathematical calculations from factors which are or ought to be in possession or knowledge of party to be charged.”

8.3B “para 12. In view of the provisions of the insurance policy, the provisions of item 14 of the Schedule to the Insurance Act, the provisions of Sec.64-UM of the Insurance Act, the percentage loss suffered to the dry dates as evidenced by the report of the surveyor, in my view, is capable, by an arithmetical

calculation, of arriving at a determinable sum, which sum would constitute a “liquidated demand” within the meaning dicta in Rifkin v. Safenovitz (supra), and the provisions of Order XXXVII of the Code of Civil Procedure.”

8.4 Thus the present suit filed by the plaintiffs under Order 37 of the CPC is maintainable on the plain reading of Order 37 as well as the decision of the Delhi High Court in the case of Rajinder Kumar Khanna (supra).

8.5 The second contention of the defendant that present suit of the plaintiffs under Order 37 is not maintainable when plaintiffs filed a suit for liquidated demand plus interest thereon. In this behalf I once again rely upon provision of Order 37 Rule 2(b) of the CPC, particularly after amendment which provides that plaintiffs can recover debt or liquidate demand in money payable by the defendant, with or without interest. The said provision makes it clear that

plaintiffs can file suit of principal amount plus interest.

8.5A In this behalf this Court rely upon Order 37 Rule 2(b) as well as judgment of this Court in the case of **Ficom Organics Ltd. Vs. Laffans Petrochemicals Limited reported in (2000) Vol.99 Company Cases 471** particularly page 487 which reads as under:

> "One contention of Mr. Vakil is required to be considered at this stage. Mr. Vakil has relied on two decisions of this court report in 1982 GLH (UJ) 7 and (1985) GLH (UJ) 2 for contending that if there is no agreement for interest and interest is claimed on the basis of custom or trade, the defendant would be granted unconditional leave to defend a summary suit as a suit for a claim inclusive of interest without any contract for such interest or without any such legal liability would not be maintainable as a

summary suit.

The aforesaid decisions are based on the decision of Chief Justice Chagla Civil Revision Application No.259 of 1954 which was rendered on the basis of the provisions of Order 37, rule 1 of the Civil Procedure Code, before its amendment. However after amendment, Order 37, rule 1 of the Civil Procedure Code specifically provides that the summary suit is maintainable, inter alia, where the plaintiff seeks only to recover a debt on a liquidated demand in money payable by the defendant **with or without interest** arising on a written contract.

The underlined words were not to be found in rule 1 of Order 37 of the Civil Procedure Code when Chief Justice Chagla took the view that such a suit would not be maintainable as a summary suit. Hence, the aforesaid decision rendered without considering the amended provisions of Order 37, rule 1 of the Civil Procedure

Code have to be treated as per incuriam. If any case they cannot be relied upon to oust the jurisdiction of the company court in admitting the winding up petition when the company's defence to a substantial portion of the petitioner's claim is found to be not bona fide."

"This court is of the view that in appropriate cases the court may consider the petitioner's claim for interest and the rate of interest after the court gives a finding that the company's defence to the principal amount of the debt was mala fide. Without laying down any hard and fast rule, it may also be said that the question could also be considered in an appropriate case if the company's defence is found to be not substantial (as distinguished from mala fide)."

8.5B The aforesaid decision of this Court in Ficom Organics (supra) completely answers the

contention of the defendant that the suit filed by the plaintiffs for principal amount plus interest is not maintainable in view of the judgment of this Court in the case of **National Textile Corporation, Ahmedabad Vs. Rajendra Sankalchand reported in 1982 GLH (U.J.) 7** and also another judgment of this Court in the case of **P.P.Prajapati Vs. M/s.Jagdish Timber Mart and others reported in 1985 GLH (U.J.) 2**, because in the Ficom case (supra) my Brother Justice M.S.Shah has considered both the judgments and answered the said issue in this behalf. The said decision of Ficom case (supra) is binding on me in this behalf.

8.5C In view of the amendment in Order 37 Rule 2 and in view of the judgment of Ficom Organics Limited (supra), I accept the contention of the plaintiffs that present suit claiming principal amount with interest is maintainable at law.

Contention of defendant regarding report of

second surveyor:

8.6 The next question which I have to consider the contention raised by defendant is that the only defence that they have appointed second surveyor and the second surveyor has surveyed the goods and came to the conclusion that the plaintiffs are not entitled for even liquidated demand as claimed for in the plaint.

8.7 While considering the aforesaid defence of the defendant, I have considered the rival contention of the plaintiffs and defendant which are on the record and which has also been considered by the learned trial Judge. From the material on record and the finding of the learned trial Judge, following position emerges.

8.7A It is not in dispute that defendant has issued marine insurance policy for the period from 16.4.2001 to 15.4.2002 for the goods to be carried out and to send for export from various ports of country and to be stored at ports Okha, Kandla, Porbandar, Mundra and Bhavnagar.

Thereafter the goods are to be loaded in the ship for the purpose of exports from the said ports. It was open marine policy. The policy also contemplates that even the goods can be stored in open for which I have already quoted earlier one of the clause of the policy.

8.7B It is not in dispute that there was cyclone at the end of May 2001 and first week of June 2001, the goods were seriously damaged. The defendant appointed four Government approved surveyors to assess the damage caused to the goods. The four Government approved surveyors have visited the sites on ports and they have inspected the goods and the segregation work was carried out in their presence and the insurance companies were also informed. Their officers have also inspected the site and verified the damaged goods. Four Government approved surveyors have assessed the damages and prepared the report for which I have already made a reference in the earlier part of the order. The plaintiffs raised claim on the basis of damages

assessed by the Government approved surveyors.

8.7C The defendant did not reply for long time. Thereafter the defendant appointed another two surveyors J.Bashir & Company and Trans Ocean Marine & General Survey Agency in the month of November 2001. As the cyclone took place in May/June 2001 and earlier the surveyor has already visited the site and assessed the damages, it is the contention of the plaintiffs that these two surveyors who have visited the site had no chance for them to inspect the goods because the goods were actually removed and therefore they could not able to assess the actual damage in this behalf and they have assessed the damages by perusing the papers and earlier reports submitted by four Government approved surveyors.

8.7D The two surveyors appointed by the defendant have also admitted the damages due to cyclone. They have also assessed the loss and they have substantially reduced the amount of

loss as stated earlier. In view of the same, there are two reports submitted by the experts having the same authority. As per earlier reports submitted by four Government approved surveyors, damages are assessed for more than Rs.4.00 crores and Rs.3.00 crores respectively in both the suits. As per subsequent reports by two surveyors, damages are decreased substantially for sum of Rs.35.00 lacs and Rs.37.00 lacs.

8.7E The defendants have not given any reasons for not accepting the report of earlier surveyors and appointing another surveyors. The plaintiffs have repeatedly written to the defendants for furnishing the copy of the letter of appointment of two surveyors. It was not furnished till the suit was filed. The defendant did not assign any reason up till now for discarding the survey report of earlier surveyors and appointing another surveyors.

8.7F It may be noted that the subsequent surveyor as per the defendant was only for

finalisation of the report. The second surveyor, therefore, cannot act as an appellate officer of the first surveyor. However, from the record, it appears that the second surveyor has acted as an appellate surveyor over the first surveyor report in this behalf. These are the basic facts which are come on the record and also finding of facts the learned trial Judge in this behalf in his order.

8.7F(i) In para 2.6A, 2.6B I have recorded the finding of the learned trial Judge. I have also recorded some of the basic facts regarding second surveyor report in para 8.6, 8.7, 8.7A, 8.7B, 8.7C, 8.7D, 8.7E and 8.7F in this behalf. The learned advocate for the insurance company – defendant was not able to seriously assail the said finding of the learned trial Judge and the findings which have been recorded by this Court and therefore I accept the contention of the plaintiffs regarding second surveyor in this behalf and I do not find any substantial defence of the defendant regarding second surveyor report.

8.7G It was contended by the learned counsel for the plaintiffs that appointment of second surveyor is not legal and valid in view of two judgments of the Consumer Court Commission which I have referred earlier in the present paragraph namely the judgment of National Consumer Disputes Redressal Commission, New Delhi in the case of **National Insurance Company Limited Vs. New Patiala Trading Company** decided by Hon'ble Mr.Justice D.P.Wadhwa (formerly a Judge of Hon'ble Supreme Court (as he was then)), President and other members decided on 8.2.2002. In this behalf this Court rely upon the said judgment particularly on page 178 of the said report which reads as under:

> “Scheme of Section 64UM, particularly of sub-section (3) and (4), would show that insurer cannot appoint second surveyor just as a matter of course. If the report of the surveyor or loss assessor is not acceptable to the insurer it must specify reasons but <u>it is not free to appoint</u>

second surveyor. Appointment by the insurer of a second surveyor itself would be a reflection on the conduct of the first surveyor. Surveyor or loss assessor is duty bound to give a correct report. If the insurer-Insurance Co. finds that surveyor or loss assessor has not considered certain relevant points or has considered irrelevant points or for any other account it has reservation about the report, it can certainly require the surveyor or loss assessor to give his views and then come to its own conclusion, but insurer cannot certainly appoint a second surveyor-cum loss assessor to counter or even contradict or rebut the report of the first surveyor."

8.7H In this connection this Court also refer to another decision of Consumer Redressal Commission in the case of **M/s.Hundi Lal Jain Cold Storage and Ice Factory Pvt. Ltd. Vs. Oriental Insurance Co. Ltd.** decided by Hon'ble Mr.Justice

M.B.Shah, (formerly a Judge of Hon'ble Supreme Court (as he was then)) President and other members decided on 24.5.2004 particularly para 18 on page 426 the Commission has also observed like this:

> "It is not expected of an insurance company to obtain one after the other survey report to suit its purpose. If the Insurance Company adopts such tactics, the purpose of insurance coverage is frustrated and insured is left unprotected from expected perils."

8.7I It is no doubt true that under Article 141 of the Constitution of India, the judgment of the Hon'ble Supreme Court is binding and it is an authoritative precedents in this behalf. However, in my view, when we have two decisions of Consumer Redressal Commission which I have referred which are presided by a Retired Judge of the Hon'ble Supreme Court of India, in my view, these two decisions they are persuasive precedent

and it has a persuasive value before this Court particularly when the defendant has not been able to cite any other contrary judgment of the Hon'ble Supreme Court in this behalf. I find lot of substance in the argument of the plaintiffs that defendant has no power and jurisdiction to appoint second surveyor. In absence of any contrary judgment, this Court is inclined to accept the contention of the plaintiffs that appointment of second surveyor by the defendant to work as appellate surveyor of first surveyor is not legal and valid.

8.7J Even if the defendant has power and jurisdiction to appoint second surveyor, the second surveyor can not act as an appellate surveyor of the first surveyor. The second surveyor has power and jurisdiction to prepare the survey report, but in the facts of this case that when second surveyor was appointed, at that relevant time the goods were already removed in question. So the second surveyor has no occasion to examine the goods and therefore in my view the

report of the second surveyor is nothing but an empty formality in this behalf.

8.7K However, when defendant received the second report, the defendant did not communicate to the plaintiffs but when the plaintiffs filed the suit, in defence the defendant raised about the second report. Thus, the second report of the surveyor is also in violation of principles of natural justice and therefore the defendant cannot rely upon the second report in the present proceedings. Thus the defence raised by the defendant is not bona fide or genuine defence in this behalf.

8.7L I have also considered the contention of the defendant that plaintiffs have acquiesced in the report of the second surveyor and therefore the plaintiffs cannot complain about the same. The said contention of the defendant is wholly erroneous and without any foundation of fact. Firstly when the second surveyor was appointed it was indicated that he was appointed for

finalisation of the work. That was the reason the plaintiffs have co-operated with the second surveyor, however, the second surveyor has worked as an appellate surveyor against the report of first surveyor. However he submitted his report so in that situation it cannot be stated that the plaintiffs have acquiesced in the report of second surveyor. The report of second surveyor was prepared with a view not to give liquidated demand as raised by the plaintiffs in the suits.

8.7M This is the contention of the plaintiffs which has been accepted by the learned trial Judge in his judgment in para 7 of the order and the learned advocate for the defendant has not been able to assail the aforesaid finding of the learned trial Judge. I, therefore, accept the finding in this behalf that when the second surveyor has visited the site, the goods were already removed.

8.7M(i) In view of this totality of circumstances it does not lie in the mouth of the

defendant to raise contention that they are not prepared to accept the claim of the plaintiffs on the basis of the report of first surveyor and they want to rely upon report of second surveyor. In view of the same the defence raised by the defendant is not a bona fide, genuine or reasonable defence raised in the suit.

8.7N It has also been contended that the plaintiffs have not taken enough care. This contention is also not right because as per the policy the plaintiffs had stored the goods in open space, but as soon as they received the warning, they had taken enough care of preserving the goods. The facts shows that ultimately it was found that only 9% loss was found to the total goods. This shows that the plaintiffs have taken enough care and attention to minimise the loss of damages to the goods.

Whether trial court has properly examined its jurisdiction as per Order 37 of CPC.

9. The next question is whether when the trial court while granting leave to defend to the defendants in present suit by imposing condition to deposit 50% of the suit amount has properly exercised judicial discretion which has been vested under Order 37 of the CPC ? In this behalf as far as discretion to be exercised by the court under Order 37 Rule 3 of the CPC, the first judgment is the judgment of the Hon'ble Apex Court in the case of **Santosh Kumar Vs. Bhai Mool Singh reported in AIR 1958 SC 321.** In the said judgment in para 8 the Hon'ble Apex Court has observed that in the case of **Jacobs Vs. Booth's Distillery Co., (1901) 85 LT 262**, the judgment delivered in 1901. Their Lordships said that whenever the defence raises a "triable issue", leave must be given. In the said decision in para 9 the Hon'ble Apex Court has observed like this:

> "The learned counsel for the plaintiff-respondent relied on AIR 1936 Mad 246 (H); Manohar Lal v. Nanhe Mal, AIR 1938 Lah 548 (I) and Shib Karan Das v. Mohammed Sadiq,

AIR 1936 Lahore 584. All that we need say about them is that if the Court is of opinion that the defence is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. We agree with Varadachariar, J., in the Madras case that the Court has this third course open to it in a suitable case."

9.1A In the said judgment in para 10 the Hon'ble Supreme Court has again examined Madras High Court judgment and observed as under:

"...In general, therefore, the test is to see whether the defence raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defence on those facts."

9.1B The another judgment is the judgment of the Apex Court in the case of **M/s.Mechalec**

Engineers & Manufacturers V. M/s. Basic Equipment Corporation reported in AIR 1977 SC 577 particularly para 8 on page 580 where the Hon'ble Apex Court has relied upon the judgment of Calcutta High Court in the case of **S.Kiranmoyee Dassi Vs. Dr.J.Chatterjee, (1945) 49 Cal WN 246 at p.253** and stated as under:

> "(a) If the defendant satisfies the Court that he has a good defence to the claim on its merits the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.
>
> (b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence although not a positively good defence the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he had a defence, yet, shows such a state of facts as leads to the interference that at the trial of the action he may be able to establish a defence to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or furnishing security."

(d) If the defendant has no defence or the defence set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the

defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defence to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defence."

9.2 I also consider the judgment of the Hon'ble Apex Court in the case of **Mrs.Raj Duggal Vs. Ramesh Kumar Bansal reported in AIR 1990 SC 2218** particularly para 3 on page 2219 of the said judgment which reads as under:

"Leave is declined where the Court is of the opinion t hat the grant of leave would merely enable the defendant to prolong the litigation by raising untenable and frivolous defences. The test is to see whether the defence raises a real issue and not a sham one, in the sense that if the facts alleged by the defendant are established there would be a good or even a plausible defence on those facts. If the Court is satisfied about that leave must be given. If there is a triable issue in the sense that there is a fair dispute to be tried as to the meaning of a document on which the claim is based or uncertainty as to the amount actually due or where the alleged facts are of such a nature as to entitle the defendant to interrogate the plaintiff or to cross-examine his witnesses leave should not be denied. Where also, the defendant shows that even on a fair probability he has a bona fide defence, he ought to have leave."

9.3 The latest judgment is in the case of the Hon'ble Supreme Court in the case of **Defiance Knitting Industries (P) Ltd. Vs. Jay Arts reported in (2006) 8 SCC 25** where the Hon'ble Apex Court has considered Order 37 Rule 2 and 3 of the CPC and also considered the judgment of Mechelec Engineers & Manufacturers Vs. Basic Equipments and Raj Duggal Vs. Ramesh Kumar Bansal and thereafter in para 13 the Hon'ble Apex Court has observed as under:

9.3A "While giving leave to defend the suit the court shall observe the following principles:

(a) If the court is of the opinion that the case raises a triable issue then leave to defend should ordinarily be granted unconditionally. See Milkhiram (India) (P) Ltd. v. Chamanlal Bros.{AIR 1965 SC 1698 : 68 Bom LR 36}. The question whether the defence raises a

triable issue or not has to be ascertained by the court from the pleadings before it and the affidavits of parties.

(b) If the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious it may refuse leave to defend altogether. Kiranmoyee Dassi Vs. Dr.J.Chatterjee {AIR 1949 Cal 479 : 49 CWN 246} (noted and approved in Mechelec case).

(c) In cases where the court entertains a genuine doubt on the question as to whether the defence is genuine or sham or whether it raises a triable issue or not, the court may impose conditions in granting leave to defend."

9.4 In view of all the aforesaid decisions, it appears that Order 37 provides for a summary procedure in respect of certain suits. The essence of the summary suit is that the defendant is not, as in an ordinary suit, entitled as of right to defend the suit. He must apply for leave to defend within ten days from the date of the service of the summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as the court may deem sufficient for granting leave to the defendant to appear and defend the suit.

9.4A From the aforesaid decisions it appears that the leave to defend should be given unconditionally if the defendant shows a prima facie case or raises a “triable issue”. Leave should be made conditional if the Court doubts the bona fides of the defendant or thinks that the defence is only put into gain time. {Re:Mulla, CPC Volume 4 page 3652}.

9.4B From the aforesaid decisions of the

Hon'ble Supreme Court and the commentary of Mulla, it appears that when the defendant raises the defence against the plaintiffs' contention, if the Court comes to the conclusion that the defence of the defendant is false, frivolous or vexatious, leave to defend should be refused altogether. For leave to defend in a summary suit for the recovery of money, the defendants must show that they have a real or substantial or a bona fide defence. The Court has to come to conclusion as to whether the defence raised by the defendant is whether it is real or bonafide or sham or moonshine. The same depends upon this circumstances the case.

9.4C In view of the aforesaid facts and circumstances of the case, when I have examined the facts of the case and the trial court also examined the facts of the case and has come to the conclusion that in the present case the damage to the goods on account of Vis Major is not in dispute. The loss is assessed by the surveyor who are appointed by the defendant. The

same has been accepted by the defendant. However, only defence of the defendant in the reply in discarding earlier surveyor report and appointment of another surveyor without any cogent and convincing reasons or material is not well justified. I have considered the facts and circumstances as to how the contention of the defendant regarding report of second surveyor is not believable to the court. In view of this, in my view, when the trial court exercised judicial discretion on sound judicial principle and the trial court has come to the conclusion that the defence of the defendant is not good or bona fide and defence is not reasonable defence and the defendant discloses such fact which may not deemed sufficient to entitle to defend the case. The trial court is well justified in directing the defendant to defend the suit only imposing condition to deposit 50% of suit amount in this behalf. In my view for imposing condition by the trial court of 50% is based on the facts and circumstances of the case and based on sound judicial discretion and the same cannot be

interfered with by this Court particularly under Article 227 of the Constitution of India.

9.5 When the trial court passed the order on the basis of the material produced by the parties, this is not the matter in which this Court while exercising power under Sec.115 of the CPC (as it was existing at the relevant time) or can entertain a petition under Article 227 of the Constitution of India in this behalf. In support of the same, this Court rely upon the judgment of this Court in the case of **United Industries and others Vs. M/s.Dalwadi and Co. and another reported in AIR 1969 Guj.18,** particularly para 5 on page 21 where the Court (Coram: P.N.Bhagwati, CJ (as he was then) and A.R.Bakshi, J.) have examined like this:

> "The last contention urged by Mr.S.K.Jhaveri on behalf of defendants Nos.1 to 4 related to the merits of the order passed by the learned Judge. But so far as the merits are concerned we do not

think there is any case made out on behalf of defendants Nos. 1 to 4 for interference under section 115 of the Civil P.C. It appears clearly that the learned Judge of the City Civil Court on a consideration of the plaint and the affidavits, was not satisfied that a bona fide triable issue was raised by the affidavits in reply and entertained a doubt as to the genuineness of the defence and he, therefore, did not grant unconditional leave to defend the suit but granted leave to defend subject to the condition of depositing Rs.4000 as security towards the plaintiffs' claims. This view taken by the learned Judge on a consideration of the plaint and affidavits may be correct or incorrect. It may even be wholly wrong. That is not a matter into which this Court acting in exercise of its revisional jurisdiction can enter, though we may point out that on a consideration of the plaint and the affidavits we are satisfied that the learned Judge was right

in granting to the defendants leave to defend the suit on condition of depositing Rs.4000. This last contention urged on behalf of defendants Nos.1 to 4 must, therefore, be rejected."

9.6 When the plaintiffs raises this contention, the learned counsel for the defendant has relied upon Division Bench judgment in the case of **The New Ashapuri Co-operative Housing Society Ltd. and another Vs. Arvindkumar Manilal Patel reported in 1975 Vol.16 GLR 53**, particularly para 3 on page 55. The learned advocate has relied upon some of the observations made by the Division Bench in that case. However, the learned counsel for the respondents-original plaintiffs stated that if one reads the entire judgment, the said judgment is also in favour of the plaintiffs – respondents herein. For that purpose the learned counsel has relied upon para 11 on page 60 which reads as under:

"To say that the High Court has power to

interfere is not to say that the High Court must interfere. Whether to interfere or not will depend on the facts of each case. If the High Court is of the opinion that an order imposing a condition has been passed notwithstanding the existence of a triable issue and notwithstanding the existence of a defence taken in good faith, the High Court can, and indeed should interfere. Of course, it follows that the High Court can certainly interfere when an order manifests non-application of mind or when it appears that certain material aspects have been ignored as has been held by S.H.Sheth J. and T.U.Mehta J. in the decisions referred to earlier."

9.6A In view of this Division Bench judgment, even if this Court has power and jurisdiction to examine the matter under Section 115 of the CPC, this Court is of the view that when the trial court passed the order on the basis of the plaint and the affidavit filed by the plaintiffs and on

the basis of the defendant's defence passed a discretionary order on a sound judicial principle. This Court is of the view that this is not a matter where this Court exercise the jurisdiction under Sec.115 of the CPC where it was available. However, Sec.115 of the CPC is now deleted, I am examining the alternative contention of the learned advocate for the respondents plaintiffs regarding maintainability of the petition under Article 227 of the Constitution of India.

9.7 So, in any view of the matter, once when the trial court has not committed any error and there is no jurisdictional error and acted with discretionary jurisdiction then this Court may not interfere in this behalf. In this connection I rely upon the judgment of the Hon'ble Apex Court in the case of **Mohd. Yunus Vs. Mohd. Mustquin reported in AIR 1984 SC 38** wherein the Hon'ble Apex Court has observed as under:

> “The supervisory jurisdiction conferred on

the High Court's under Article 227 of the Constitution is limited “to seeing that an inferior Court or Tribunal functions within the limits of its authority” and not to correct an error, apparent on the face of the record much less an error of law.”

9.8 I may also refer to the judgment of the Hon'ble Supreme Court in the case of **Ouseph Mathai And Others Vs. M. Abdul Khadir reported in (2002) 1 SCC 319** wherein the Hon'ble Apex Court has observed as under:

"It is true that in exercise of jurisdiction under Article 227 of the Constitution the High Court could go into the question of facts or look into the evidence if justice so requires it, if there is any misdirection in law or a view of fact taken in the teeth of preponderance of evidence. But the High Court should decline to exercise its

jurisdiction under Articles 226 and 227 of the Constitution to look into the fact in the absence of clear and cut down reasons where the question depends upon the appreciation of evidence. The High Court also should not interfere with a finding within the jurisdiction of the inferior tribunal except where the findings are perverse and not based on any material evidence or it resulted in manifest injustice (see Trimbak Gangadhar Teland 1977 (2) SCC 437).”

9.8A In view of the judgment of the Hon'ble Supreme Court in the case of Mohd. Yunus (supra) and also in the case of Ouseph Mathai and others (supra), I am of the view that even if this Court has power to examine the matter under Article 227 of the Constitution, this Court is of the view that this Court may not exercise the power under Article 227 of the Constitution because there are no jurisdictional error committed by the learned Judge in this behalf. The trial court passed the

order within the jurisdiction and the trial court has not crossed the limit of the authority while passing the order.

9.8B I have also considered the judgment of Jashbhai Motibhai Patel (supra) cited by the defendant. However, in that case the defendant denied the existence and execution of the suit promissory note and therefore the Court directed that unconditional leave to defend has to be granted. In the present case these are not the facts and therefore the said judgment is not applicable in this behalf.

9.8C The learned counsel for the respondents-original plaintiffs has also relied upon judgment of this Court in Special Civil Application No.21874 of 2005 decided by this Court (Coram: K.M.Mehta, J.) on 28.12.2005 where this Court has taken the similar view in this behalf.

Contention regarding indemnity:

9.9 In Law of Contract, Chapter VIII

provides Chapter of Indemnity and Guarantee. Sec.124 provides contract of indemnity which defined as under:

> “Sec.124 `Contract of indemnity' defined – A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a `contract of indemnity'.”

9.9A In this behalf this Court rely upon the judgment of Bombay High Court in the case of **Gajanan Moreshwar Parelkar Vs. Moreshwar Madan Mantri reported in AIR 1942 Bombay p.302.** In the said judgment on page 303 and on page 304 Hon'ble Mr.Justice Chagla (as he was then) has observed like this:

> “Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused

to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier."

Now on page 304 reads as follows:

"It is true that under the English common law no action could be maintained until actual loss had been incurred. It was very soon realized that an indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. If a suit was filed against him, he had actually to wait till a judgment was pronounced and it was only after he had satisfied the judgment that he could

sue on his indemnity. It is clear that this might under certain circumstances throw an intolerable burden upon the indemnity-holder. He might not be in a position to satisfy the judgment and yet he could not avail himself of his indemnity till he had done so. Therefore, the Court of equity stepped in and mitigated the rigour of the common law. The Court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into Court sufficient money which would constitute a fund for paying off the claim whenever it was made. As a matter of fact, it has been conceded at the bar by Mr.Tendolkar that in England the plaintiff could have maintained a suit of the nature which he has filed here; but, as I have pointed out, Mr.Tendolkar contends that the law in this country is different. I have

already held that Ss.124 and 125, Contract Act, are not exhaustive of the law of indemnity and that the Courts here would apply the same equitable principles that the Courts in England do. Therefore, if the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and to pay it off."

9.9B From the aforesaid Section 124 which I have quoted and the judgment of Bombay High Court, the section deals only with one particular kind of indemnity which arises and the subject of contract of indemnity is much wider than what is given in this section. The aforesaid judgment of Bombay High Court has been considered by Mulla on Contract Act, 12th Edition page 1727 where the learned Author has observed as under:

"The Law Commission of India accepted the view that `to indemnify does not mean to

reimburse in respect of money paid, but, in accordance with its derivation, to save from loss in respect of the liability against which the indemnity has been given', and recommended adding a section to the act specifying the rights of the indemnity-holder, and the remedies available to him even in cases when he is not sued. {Thirteenth Report of the Law Commission of India, 1958, para 104 recommended adding a section as follows:

125A. Rights of indemnity-holder:

(1) The promisee in a contract of indemnity acting within the scope of his authority may, where a liability has arisen against him in favour of a third party, obtain against the promisor, in an appropriate case, a decree compelling the promisor to set apart a fund out of which the promisee may meet such liability or directing the promisor to discharge such liability himself.

(2) The promisee may institute a suit under this section even where no such suit as is referred to in s.125 has been instituted, and irrespective of whether any actual loss has been sustained by the promisee or not.

Explanation:- The promisee is not precluded from obtaining relief under this section merely on the ground that the promisee's liability to the third party cannot be effectively enforced against him."

9.9C In view of this provision of Contract Act and in view of the judgment of the Bombay High Court, it appears that where the defendant's promise to indemnify is an absolute one, the suit can be filed immediately upon the failure of performance, irrespective of actual loss. If the indemnity holder had incurred a liability and that liability is absolute, he is entitled to

call upon the indemnifier to save him from that liability and pay it off.

9.9D As regards contract of indemnity, this Court is of the view that almost all insurances other than life and personal accident insurances are contracts of indemnity. The object of the contract of insurance is principally to place the insured as far as possible in the same position in which he would be if the insured event causing the loss had not occurred and, therefore, in view of this the insurer undertakes within the limit of the obligation, to compensate the insured for his actual loss.

Regarding filing of suit by one Government of India undertaking against another Government of India undertaking:

9.10 In the plaint the plaintiff has referred that plaintiff No.1 is a Government of India undertaking and defendant No.1 is also Government

of India undertaking and before they approach the court of law in view of the judgment of the Hon'ble Apex Court in the case of **ONGC Vs. Collector of Central Excise reported in (1995) 4 SCC 541** the matter was referred to Committee and ultimately the Committee has indicated that the decision has to be taken by court of law and therefore the present suit has been filed. I may also observe that even after the judgment of ONGC case, once the legal battle is between the plaintiff and defendant No.1, who is a Government of India undertaking, the Hon'ble Apex Court in the case of **Chief Conservator of Forest, Government of Andhra Pradesh Vs. Collector and others reported in (2003) 3 SCC 472** has observed as under:

> “It is neither appropriate nor permissible for two departments of a State or the Union of India to fight litigation in a Court of law. Indeed, such a course cannot but be detrimental to the public interest as it also entails avoidable wastage of public money and time. Various

departments of the Government are its limbs and, therefore, they must act in coordination and not in confrontation. Filing of a writ petition by one department against the other by invoking the extraordinary jurisdiction of the High Court is not only against the propriety and polity as it smacks of indiscipline but is also contrary to the basic concept of law which requires that for suing or being sued, there must be either a natural or a juristic person. The States/Union of India must evolve a mechanism to set at rest all interdepartmental controversies at the level of the Government and such matters should not be carried to a Court of law for resolution of the controversy. The Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior Officers only should be nominated so that the Committee would function with

status, control and discipline."

10. This Court hopes and trusts that in future when the Government of India undertaking files a petition against other Government of India undertaking, the said authority may take into consideration of the aforesaid judgment of the Hon'ble Apex Court in the ONGC case (supra) as well as in the case of Chief Conservator of Forest, Government of Andhra Pradesh Vs. Collector and others (supra) so that lot of time, energy and public money as well as court time can be saved.

11. In view of these discussions, following conclusion is recorded by this Court as under:-

(i) In view of Order 37 Rule 2 of the CPC and in view of the Delhi High Court judgment in the case of Rajinder Kumar Khanna Vs. The Oriental Insurance Co. and another (supra), the present suit filed by the plaintiffs

for liquidated demand is maintainable.

(ii) In view of Order 37 Rule 2 of the CPC and in view of the judgment of this Court in the case of Ficom Organics Limited (supra), the present suit filed for principal amount plus interest is also maintainable at law.

(iii) As regards contention of defendant regarding appointment of second surveyor, for the reasons stated by this Court, the defence of the defendant is not a bona fide defence and defence raised by the defendant does not raises a real issue and defence raised by the defendant is not a plausible defence on the facts stated by the defendant in this behalf. The Court is not satisfied that defendant has a good defence to the claim on its merits. The defence raised by the defendant does not

raises any triable issue.

12. In the facts and circumstances of the case, when the trial Court imposed the conditions, the said conditions are based on material facts set out in the case and the learned trial Judge has exercised discretion on sound judicial principle. In view of the same, this Court do not intend to interfere with the discretionary order of the learned trial Judge based on sound principle after appreciating all the facts and circumstances of the case by imposing condition of depositing 50% of the suit amount particularly in view of Division Bench judgment of this Court in Dalwadi case (supra), and coupled with the fact that two decisions of the Hon'ble Supreme Court where under Article 227 of the Constitution, the Hon'ble Supreme Court held that the High Court should not interfere with the discretionary jurisdiction in this behalf.

13. In view of the discussions made

hereinabove, the petition is required to be dismissed. Hence this petition is dismissed. Rule is discharged with no order as to costs.

14. This Court is extremely grateful to Mr.Vibhuti Nanavati, learned advocate appeared on behalf of the petitioner, Mr.Mihir Thakore, learned Senior Counsel with Mr.Amar Bhatt, learned advocate appeared on behalf of the respondents-original plaintiffs and Mr.Kamal B.Trivedi, learned Senior Advocate and learned Advocate General with Mr.K.J.Thakar, learned advocate who has appeared before this Court and very ably assisted this Court so that this Court can decide the matter.

(K.M. MEHTA, J.)

After pronouncement of the judgment, Shri P.V.Nanavati, learned advocate for the petitioner prays that the order passed by the trial Court

dated 22.9.2006 by which the Court has granted leave to defend to defendants in Summary Suit Nos.2812 of 2004 and 2813 of 2004 on condition to deposit 50% of the suit amount in both the suits within four weeks from the date of passing the order and further directed that on depositing the amount, suits be transferred to long cause suits. The said order dated 22.9.2006 passed by the learned trial court has been extended from time to time till today. However, in view of the pronouncement of judgment, Shri Nanavati prays that this Court may stay the order of the trial court dated 22.9.2006 for further six weeks as defendant desires to assail the judgment of this Court before the Hon'ble Supreme Court of India. To this prayer, Mr.Amar Bhatt and Mr.Thakar, learned advocates who appeared on behalf of the original plaintiffs stated that they have strong objection if the Court extend the time. This Court is of the view that when any party desires to approach the Hon'ble Apex Court, in the interest of justice, this Court may grant some time so that the parties can challenge the matter

before the higher forum. In view of the same, stay as prayed for is extended upto 19th January, 2007.

(K.M. MEHTA, J.)

syed/vyas